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No. 477

In the Supreme Court of the United States

OCTOBER TERM, 1930

RICHARD HUSTY AND CHARLES LAUREL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by either the District Court or the Circuit Court of Appeals.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 28, 1930. (R. 62.) The petition for certiorari was filed September 26, 1930, and was granted November 24, 1930. (R. 62.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the arrest of the petitioners and the search and seizure of the automobile involved were upon probable cause.

2. Whether the indictment states an offense.

3. Whether the sentences imposed were warranted by the convictions.

STATUTES INVOLVED

The statutes involved are set forth in the appendix to this brief, pp. 21–23, *infra*.

STATEMENT

On March 5, 1930, the petitioners were indicted in the United States District Court for the Western District of Michigan on two counts respectively charging them with transportation and possession of whiskey in violation of the National Prohibition Act. The second count set forth prior convictions of the petitioner Husty for unlawful possession of intoxicating liquor on November 9, 1922, and on April 3, 1928. (R. 1–3.) Upon arraignment both petitioners stood mute, whereupon a plea of not guilty was entered as to each. (R. 3.) A motion was made to suppress the evidence, and a demurrer to the indictment and a motion to quash it were filed. All of these were overruled. (R. 3–8.) A motion was made by petitioner Husty for a separate trial, which was also denied. (R. 7–8.)

The testimony at the hearing on the motion to suppress the evidence is discussed on pp. 7–8, *infra*.

The testimony at the trial on the merits was brief and uncontradicted. Arthur Q. Scully, Deputy Prohibition Administrator, testified that on the evening of December 10, 1929, he saw the petitioners with a third man get into a Graham-Paige coupé near the corner of Jefferson Avenue and Pleasant Street in Grand Rapids, Michigan, that petitioner Husty took the wheel and started the motor and had started to pull out into traffic when the witness stopped him. The petitioner Laurel and the third man got out of the car and ran. The witness was accompanied by Ray W. Harring, a Prohibition Agent. The petitioners were arrested[1] but the third man got away. The witness saw whiskey in the car, and later searched the car thoroughly and found eighteen cases and one quart of whiskey. One of the bottles was introduced in evidence. The witness searched the petitioner Husty after arresting him and found $960 in cash and two checks on his person. Husty refused to make any statement regarding the money. The petitioner Laurel stated that he had not known Husty until the afternoon of that day, that he came over from Detroit in the car, that he did not know that liquor was in the car, and

[1] The record does not show clearly whether the arrest was made before or after the search, but, as pointed out on page 12, *infra*, the time of arrest is not material.

that he did not know who the man was who escaped. (R. 47–49.)

Harring corroborated the testimony of Scully. (R. 49–50.) The defense introduced no testimony, and admitted that Husty had been twice before convicted of unlawful possession of liquor. (R. 50.)

The court instructed the jury to return a verdict, "We find Respondents guilty as charged," if they should find both of them guilty on both counts, and to indicate by the verdict the count upon which each was convicted in the event of an acquittal of either defendant on either count. (R. 56–57.) The verdict of the jury showed that both were convicted on both counts, as it stated that the jury found "defendants guilty in manner and form as the government have in their indictment in this cause alleged and complained against them." (R. 8.)

After overruling motions for a new trial and motions for judgments *non obstante veredicto*, the court sentenced petitioner Husty to five years in the penitentiary and to pay a fine of $3,000, and petitioner Laurel to one year and six months in the reformatory. The sentences were general, not referring to either of the counts. (R. 9, 12.) The convictions were affirmed by the Circuit Court of Appeals without opinion, the judgment of the court reading as follows (R. 62):

> It appearing (1) that the search was reasonable and the motion to suppress properly denied; (2) that the indictment was good

and that it was not necessary to make reference therein to the so-called Jones Law; (3) that it was proper upon the trial to exclude evidence as to the reasons for the search,—that subject matter having been foreclosed by the decision of the motion to suppress; (4) that the sentence was supported by conviction on the second count; (5) and that the other errors alleged are not well taken—

Ordered that the judgment and sentence of the court below as to each appellant be and is hereby affirmed. Let the mandate issue forthwith.

SUMMARY OF ARGUMENT

I

The motion to suppress the evidence was properly overruled. No warrants were necessary and the arrest and the search of the car were upon probable cause. The prohibition officer had known Husty as a "bootlegger" for a number of years, having previously arrested him for liquor violations, which arrests resulted in convictions. The information upon which the officer acted was definite and recent. It came from a man well known to him and upon whom he was justified in relying because of ample experience. These facts, together with the fact that the car was found at the exact place described, were sufficient to warrant the officer in believing that intoxicating liquor was being unlawfully transported in the automobile which he stopped and searched. The contention that there

was no arrest prior to the search and that arrest must precede the search is foreclosed by the decision of this Court in *Carroll* v. *United States*, 267 U. S. 132, 158.

The refusal of the court to permit counsel for the accused to question the officer as to the identity of his informant was in accordance with the authorities; and we submit that petitioners have not preserved their rights to raise this point.

II

The indictment sufficiently charged offenses under the statute as amended. It mentioned all the essential elements of those offenses and alleged that the offenses took place within the jurisdiction of the court. There is nothing to indicate that petitioners were taken by surprise or that they had any doubt as to the charges which they were expected to meet. Any further information necessary to their defense could have been supplied by a bill of particulars, but this was not demanded.

III

Although the judgment of the Circuit Court of Appeals was incorrect in stating that the sentences were supported by conviction on the *second* count of the indictment, they should not be disturbed. The sentences were within the power of the court to impose for the offense of transportation charged in the first count, of which petitioners were also convicted. The sentence imposed on each de-

fendant was a general one. The proviso in the Jones Act that the court discriminate in imposing sentences was not intended as a limitation upon the power of the court.

ARGUMENT

I

THE ARREST AND SEARCH AND SEIZURE WERE UPON PROBABLE CAUSE

The petitioners moved to suppress the evidence secured from the search of the car, on the ground that their arrest and the search of the car, made without warrants, were without probable cause.

That no warrants were necessary is settled by the decision of this Court in *Carroll* v. *United States*, 267 U. S. 132. The question is whether there was probable cause for the arrest and search. In the *Carroll* case (p. 161) this Court approved the following definition of probable cause:

> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

The Government contends that the evidence introduced at the hearing on the motion to suppress was sufficient to show probable cause, as so defined. Scully had known petitioner Husty as a "bootlegger" for a number of years. He had arrested him in 1922 and again in 1928 for violations of the prohibition laws. These arrests resulted in convictions. (R. 18–19, 23.) The officer thus had di-

rect proof of the "bootlegger's" activities. In the *Carroll* case there was no direct evidence of law violations prior to the arrest.

On the day in question Scully received information that Husty had two loads of liquor in certain automobiles, parked at particular places on certain named streets. (R. 19–20.) This information came to Scully from a man in whom he had confidence. He had previously received information from this man and had always found it reliable. (R. 21.) He had known this man about eight years, had met him on the street and in his own office as well as in this man's office on numerous occasions, and had come in frequent contact with him in a business and social way. (R. 21.) In his extended experience with this man he had always found him truthful. (R. 24.) The information first came to the witness over the telephone, but he later met the man personally. He asked the informer whether he had personal knowledge of the information he was imparting and whether he had seen the liquor in the car. He was assured that the liquor was in the car. (R. 22–23.)

In response to the information so obtained, Scully went to look for the cars in question and found one of them at the place designated by his informant. Husty was later seen getting into the car and attempting to drive it away. When he was stopped, the two men with him ran from the scene, and the car was found to be loaded with liquor. (R. 20, 23, 47–48.)

This was not a case of stopping an automobile on the chance of finding liquor. The information which Scully had was recent, definite, and convincing. Under all these circumstances the following language which this Court used in the *Carroll* case is peculiarly applicable (pp. 158, 162, 161):

> The language of the section [Section 26] provides for seizure when the officer of the law "discovers" any one in the act of transporting the liquor by automobile or other vehicle. Certainly it is a very narrow and technical construction of this word which would limit it to what the officer sees, hears or smells as the automobile rolls by and exclude therefrom, when he identifies the car, the convincing information that he may previously have received as to the use being made of it.
>
> * * * * *
>
> * * * it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.
>
> "* * * if he [the officer] suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful."

In the *Carroll* case the car was stopped on the highway several months after the transaction which the officers had with the defendants. They were not looking for the defendants at the time. Here Scully was looking for Husty immediately after receiving information that he had liquor. The conclusion of this Court in the *Carroll* case (p. 160) would seem to be clearly applicable here:

> That the officers when they saw the defendants believed that they were carrying liquor we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so.

In *Brady* v. *United States*, 300 Fed. 540 (C. C. A. 6th), the prohibition agents received information that a distillery was to be robbed on a certain night and that the liquor was to be transported over a designated highway in two described cars. The officers stationed themselves on the highway, stopped several cars as they came along, and finally intercepted the two cars they were looking for. They had no prior knowledge of the defendants' "bootlegging" activities, as in the instant case, and had nothing upon which to base their search except the information given them by their informant and, possibly, the additional fact that as the cars approached them they noticed that they were accompanied by a covered truck. The search and seizure were upheld, and certiorari was denied by this Court. 266 U. S. 620.

In *United States* v. *Lukas,* 35 F. (2d) 599 (D. Mass.), the prohibition officers received a written communication that liquor was being transported from a certain house in a described automobile. The communication was turned over to an agent who interviewed the informant and made certain independent investigations concerning the informant and the defendant—a procedure not necessary in the instant case because here the officer believed his informant trustworthy and also knew that the man informed against was a "bootlegger." On the morning of the search the agent saw the defendant come out of the house with a bundle and place it in the automobile. After the defendant drove away the agent stopped and searched the car and found therein a quantity of liquors. There was nothing in the conduct of the defendant which, independent of other facts, would excite suspicion, nor did the agent obtain any information by the use of his senses respecting the contents of the package. Relying on the ruling of this Court in the *Carroll* case, that the officer is not limited "to what he sees, hears or smells" at the time of the search, but may rely upon any "convincing information that he may previously have received as to the use being made of" the automobile, the court held that there was present that "probable cause to believe" essential to the validity of a search without a warrant (p. 600).

See also *Ash* v. *United States,* 299 Fed. 277 (C. C. A. 4th); *Park* v. *United States,* 294 Fed. 776,

782–783 (C. C. A. 1st); *Kudy and Langtry* v. *United States*, decided June 28, 1930 (C. C. A. 6th); certiorari denied October 20, 1930 (No. 392).

Petitioners complain that there was no arrest prior to the search. They contend that there is nothing in the record indicating that the arrest was made until after the liquor was discovered. The contention is foreclosed by the *Carroll* case, where it was held (p. 158) that the right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. In fact, the language of Section 26 of the National Prohibition Act (*infra*, pp. 21–22) seems to contemplate that the seizure should precede the arrest.

Petitioners further contend that if Scully deemed the source of his information reliable he had ample time in which to have secured the proper warrants. But the officer had no means of knowing how soon the car might be moved. In the *Carroll* case (p. 153) it was pointed out that if it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought, the officer may proceed without a warrant.

The petition for certiorari (p. 4) suggests as one of the questions involved herein, "Whether cross-examination of the officers, as to reliability

of information on which an arrest is made without warrant should have been allowed;" and the matter is alluded to in the supporting brief (p. 13), although it is not argued there at length. We are left in some doubt as to petitioners' exact position in regard to this matter. If their contention is that in the absence of testimony as to the identity of the informant it did not appear that the searching officer had probable cause, we submit that the objection is without weight. The testimony which was introduced was sufficient.

If petitioners' objection is that the action of the court in sustaining objections to certain questions asked during the hearing of the motion to suppress in itself constituted reversible error, our answer is (1) the petitioners are not in a position to raise this objection, and (2) the objection is not valid.

(1) The errors assigned on appeal not only did not specify any particular questions but did not refer even generally to any matter of admissibility of evidence arising on the hearing of the motion to suppress. The only error assigned in regard to the exclusion of testimony was No. 22 (R. 14), which reads as follows:

> That the trial court committed prejudicial error in sustaining the objections of counsel for plaintiff tending to show the defendants efforts to determine that the information upon which the arresting officer acted and made the arrest was from a reliable or unreliable source.

That part of the transcript which reports the hearing on the motion covers over twenty pages (R. 17–41) and is replete with questions asked by petitioners' counsel as to which objection was sustained. Even if the specification of error quoted above can be construed to refer to this hearing, we submit that it is not sufficiently specific to require this Court to pass upon it. It may refer to matters of the same nature arising at the trial. (See R. 53.) The Circuit Court of Appeals evidently so treated the specification, as its judgment stated "that it was proper upon the trial to exclude evidence as to the reasons for the search,—that subject matter having been foreclosed by the decision of the motion to suppress;" although the judgment also recited "that the other errors alleged are not well taken." (R. 62.)

(2) The rulings in the course of the hearing of the motion were correct. They were in accord with the decision in *Segurola* v. *United States*, 16 F. (2d) 563, 565 (C. C. A. 1st), and authorities there cited, where it was held that the trial court properly sustained an objection to a question as to who gave the confidential information that a certain car was coming through with liquor, the ground of the objection being that the source of such information was a secret of the officers which should not be given in a court of justice and that to divulge the source of such information would be against public safety. The question was raised in this Court when the

case came before it on certiorari (275 U. S. 106, 110), but the Court did not find it necessary to decide the point.[2]

II

THE INDICTMENT CHARGES OFFENSES WITH SUFFICIENT PARTICULARITY

The petitioners contend that the indictment does not charge the crimes alleged with sufficient particularity. The indictment alleges the unlawful transportation in a Graham-Paige coupé and the unlawful possession of intoxicating liquor fit for use for beverage purposes, to-wit, whiskey, on December 10, 1929, in Grand Rapids, Kent County, Michigan, within the jurisdiction of the court. (R. 1–2.) The petitioners' objection is that the indictment does not specify the amount of the liquor, nor the time when or the place where it was illegally transported and possessed. We submit that the indictment contained all the essential elements of the offenses averred and duly informed the petitioners of the charges against them. See *Gurera* v. *United States*, 40 F. (2d) 338 (C. C. A. 8th); *Jacobs* v. *United States*, 24 F. (2d) 890 (App. D. C.); *Leonard* v. *United States*, 18 F. (2d) 208 (C. C. A. 6th); *Myers* v. *United States*, 15 F. (2d) 977 (C. C. A. 8th); *Hovermale* v. *United States*, 5 F.

[2] This point is discussed in detail and authorities bearing on it are collected on pp. 12–18 of the brief for the United States filed in that case, No. 195, October Term, 1927. Copies of that brief have been furnished to counsel for petitioners here.

(2d) 586 (C. C. A. 4th); *Pane* v. *United States*, 2 F. (2d) 855 (C. C. A. 8th). There is nothing in the record indicating that petitioners were taken by surprise or that they were in any doubt as to the offenses with which they were charged. Transportation and possession of intoxicating liquor in an automobile without a permit in any amount is unlawful at any time and at any place. The allegation that the offenses took place within the jurisdiction of the court is sufficient. Had petitioners desired further information, it could have been supplied by a bill of particulars *Durland* v. *United States*, 161 U. S. 306, 315. Such a bill was not asked for. If at any time in the future they should find it necessary to plead the record and conviction in this case in bar of another prosecution, the time and place, as well as the amount of liquor involved, may be shown by other proof. See *Dunbar* v. *United States*, 156 U. S. 185, 191.

In *Skelley* v. *United States*, 37 F. (2d) 503 (C. C. A. 10th), cited by petitioners in support of their contention that the indictment should have stated with more particularity the *place* of the commission of the offenses charged, the objection appears to have been raised by special demurrer. In the instant case the demurrer was general in form, and as no prejudice is shown, the objection is not available. R. S. Section 1025 (U. S. C., Title 18, Sec. 556). *Ledbetter* v. *United States*, 170 U. S. 606, 613; *Myers* v. *United States*, 15 F. (2d)

977 (C. C. A. 8th); *Leonard* v. *United States*, 18 F. (2d) 208 (C. C. A. 6th).

Petitioners further attack the indictment because it omits the word "knowingly." But the statute does not make knowledge an element of the offense. The indictment complied with Section 32, Title II, of the National Prohibition Act, which provides that "it shall be sufficient to state that the act complained of was then and there prohibited and unlawful."

Petitioners also object that the indictment did not expressly mention the Jones Act (*infra*, p. 23). It stated that the transportation and possession were in violation of the National Prohibition Act *as amended*, which of course includes all amendments, and it charged the commission of the alleged offenses subsequent to March 2, 1929, the effective date of the Act. Furthermore, the *offense* is defined by the National Prohibition Act; the Jones Act affects only the punishment to be imposed upon conviction.

The petitioners next contend that the indictment was insufficient because it did not advise them whether they were charged with a misdemeanor or a felony, or whether they were charged as casual or slight offenders or as habitual or commercial violators. This complaint is apparently based on the theory that the Jones Act created new offenses, for without that as a premise there is nothing upon which such argument can rest. But the Jones Act created no new offenses. Its obvious purpose was to increase the maximum penalties which might be

imposed for certain violations of the National Prohibition Act. The proviso to the Jones Act defines no new crime, but merely cautions the court to exercise a judicial discretion in the imposition of sentences. *Ross* v. *United States*, 37 F. (2d) 557 (C. C. A. 4th); certiorari denied, 281 U. S. 767; *United States* v. *Kent*, 36 F. (2d) 401 (S. D. Ill.). Contentions similar to those relied upon by petitioners were made in *McElvogue* v. *United States*, No. 167, October Term, 1930, in which this Court denied certiorari on October 13, 1930.

III

THE SENTENCES SHOULD NOT BE DISTURBED

Petitioners contend that the sentences can not be sustained under the second count, as held by the Circuit Court of Appeals, because the increased penalties under the Jones Act did not cover the offense of possession; that they can not be supported under the first count, because there was no evidence of prior conviction for transportation, and the penalties of the Jones Act can not be applied to an isolated case of transportation; that the prior convictions charged in the indictment related to possession on the part of Husty, and the sentence imposed on him exceeded that which could have been imposed under Section 29, Title II, of the National Prohibition Act.

It is true that the sentences are in excess of those provided for the possession of intoxicating liquor (See Sec. 29, p. 22, *infra*), and it is consequently obvious that the statement in the judgment of the

Circuit Court of Appeals "that the sentence was supported by conviction on the second count" (R. 62) is erroneous. As the judgment shows nothing about the first count and as the sentences were proper under the first count, it seems probable that this was a mere inadvertent error. As the evidence in regard to possession and transportation was practically the same, it seems highly improbable that the Circuit Court of Appeals intended to sustain the conviction only as to the count relating to possession.

The trial court had power under the Jones Act to impose a sentence for transportation of imprisonment not to exceed five years and a fine not to exceed $10,000. There was a general verdict of guilty, and the sentences imposed were general sentences which did not exceed those which might have been imposed under the first count. See *Abrams* v. *United States*, 250 U. S. 616, 619; *United States* v. *Trenton Potteries*, 273 U. S. 392, 401–402. Obviously, the proviso that Congress intended the court to use discrimination in imposing sentences was not intended as a limitation upon the power of the court. If the sentences were within the discretion of the trial court, petitioners' only recourse is to the executive. The court in imposing the sentences no doubt took into consideration the evidence in the case. See *Ross* v. *United States, supra* (p. 559).

The validity of the sentences is further questioned on the ground that they contravene the con-

stitutional provision relating to *ex post facto* laws. The contention of the petitioners apparently is that in applying the proviso of the Jones Act the trial court may not consider violations of the National Prohibition Act occurring prior to the enactment of the Jones law. We submit that this is unsound. In support of this contention petitioners rely upon *Cisson* v. *United States*, 37 F. (2d) 330 (C. C. A. 4th). That case is not in point. There, a "second offense" of sale was committed prior to the passage of the Jones Act and the question involved was whether that Act repealed the provision of the National Prohibition Act prescribing the punishment for such an offense.

CONCLUSION

No adequate ground is presented for disturbing the judgment of the court below, and it should therefore be affirmed.

Respectfully submitted.

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JANUARY, 1931.

APPENDIX

STATUTES INVOLVED

Section 3, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 308 (U. S. C., Title 27, Sec. 12):

> No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided and the commissioner may, upon application, issue permits therefor: *Provided*, That nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.

Section 26, p. 315 (U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting

in violation of the law, intoxicating liquors in any * * * automobile * * * it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the * * * automobile * * * and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; * * *

Section 29, p. 316 (U. S. C., Title 27, Sec. 46):

Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment.

Act of March 2, 1929, c. 473, 45 Stat. 1446 (U. S. C. Sup. III, Title 27, Secs. 91, 92), amending the National Prohibition Act, and commonly known as the Jones Act:

> That wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 1, Title II, of the National Prohibition Act, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law.
>
> SEC. 2. This Act shall not repeal nor eliminate any minimum penalty for the first or any subsequent offense now provided by the said National Prohibition Act.

U. S. GOVERNMENT PRINTING OFFICE: 1931

SUPREME COURT OF THE UNITED STATES.

No. 477.—October Term, 1930.

Richard Husty and Charles Laurel, Petitioners, *vs.* United States.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 24, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioners were convicted in the District Court for Western Michigan upon two counts of an indictment, the first for transporting, and the second for possessing, intoxicating liquors in violation of the National Prohibition Act. They had been apprehended while in an automobile, and arrested without warrant. The officers had searched the automobile, without warrant, and found a quantity of intoxicating liquor, which they had seized. A motion by petitioners to suppress the use as evidence of the information thus acquired, on the ground that the arrest and the search and seizure were illegal, was denied. Each count of the indictment set forth a single offense; and the second, that for possession, alleged two prior convictions of petitioner Husty for unlawful possession. Petitioners were sentenced generally on the indictment, without reference to either count, Husty to five years' imprisonment and to pay a fine of $3000, and Laurel to imprisonment for one year and six months.

In the course of the proceedings before the District Court, petitioners, by appropriate motions and exceptions, challenged the correctness of the order denying the motion to suppress evidence; the sufficiency of the indictment; and the legality of the sentences, the last on the grounds that they were not authorized by the Jones Act of March 2, 1929, c. 473, 45 Stat. 1446, and exceeded the maximum penalties which could be imposed under § 29 of the National Prohibition Act.

The Court of Appeals for the Sixth Circuit, without opinion, affirmed the convictions under both counts and held the sentences to be supported by the convictions upon the second count—that for possession—alone. This Court granted certiorari, 282 U. S. —, Nov. 24, 1930, on a petition which asked review of the rulings of the District Court which have been mentioned, the government op-

posing on the ground, among others, that the sentences were proper under the possession count.

1. In the proceeding to suppress evidence, one of the prohibition officers who made the arrest testified that he had known Husty to be a "bootlegger" for a number of years before the arrest, and had arrested him in 1922 and 1928 for violations of the National Prohibition Act, both arrests resulting in conviction and the second in imprisonment. On the day of petitioners' arrest, the witness had received information over the telephone that Husty had two loads of liquor in automobiles of a particular make and description, parked in particular places on named streets. The witness was well acquainted with his informant, having known him for about eight years, and had come in frequent contact with him in business and socially. The same person had given similar information to the witness before, which had always been found to be reliable. The officer believed the information, and, acting upon it, found one of the cars described, at the point indicated, and unattended. Later, petitioners and a third man entered the car. Husty had started it when he was stopped by the officers. Laurel and the third man fled, and the latter escaped. The officers, believing that the car contained intoxicating liquor, searched it, and found eighteen cases of whiskey.

The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. *Carroll* v. *United States*, 267 U. S. 132. We think the testimony which we have summarized is ample to establish the lawfulness of the present search. To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. *Dumbra* v. *United States*, 268 U. S. 435, 441; *Carroll* v. *United States, supra.* It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. See *Dumbra* v. *United States, supra; Stacy* v. *Emory*, 97 U. S. 642, 645.

Here the information, reasonably believed by the officer to be reliable, that Husty, known to him to have been engaged in the illegal traffic, possessed liquor in an automobile of particular description and location; the subsequent discovery of the automobile at the point indicated, in the control of Husty; and the

prompt attempt of his two companions to escape when hailed by the officers, were reasonable grounds for his belief that liquor illegally possessed would be found in the car. The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car or how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause, and not unreasonable; and the motion to suppress the evidence was rightly denied. *Carroll* v. *United States, supra.*

In the course of the hearing on the motion, questions by petitioners seeking to establish the name and identity of the officer's informant, were excluded. Petitioners ask review of these rulings on the evidence, but we do not consider them, since they were not assigned as error on the appeal to the Court of Appeals, and it does not appear that they were presented or passed upon there. *Duignan* v. *United States*, 274 U. S. 195, 200.

2. The indictment is in the form authorized by § 32 of the National Prohibition Act. It charges the transportation of intoxicating liquor as a first offense by both petitioners, and possession as a first offense by Laurel, and as a third offease by Husty, at a named time, and at a place within the jurisdiction of the court. Failure to state more specifically the amount of the liquor, and the time and place of the offenses charged, does not affect the validity of the indictment. It was at most ground for a bill of particulars if timely application had been made. See *Durland* v. *United States*, 161 U. S. 306, 315.

It is urged that the indictment is defective, because it fails to state whether the offenses charged were felonies or misdemeanors, and whether the petitioners were charged with casual or slight violations, or habitual sales of intoxicating liquor, or attempts to commercialize violations of the law, which, petitioners argue, were made new or aggravated offenses by the Jones Act.

But the Jones Act created no new crime. It increased the penalties for "illegal manufacture, sale, transportation, importation or exportation", as defined by § 1, Title II of the National Prohibition Act, to a fine not exceeding $10,000, or imprisonment not exceeding five years, or both, and added as a proviso, "that it is

he intent of Congress that the court, in imposing sentence here-
nder, should discriminate between casual or slight violations and
abitual sales of intoxicating liquor, or attempts to commercialize
iolations of the law." As the Act added no new criminal offense
those enumerated and defined in the National Prohibition Act,
added nothing to the material allegations required to be set out
indictments for those offenses. The proviso is only a guide to
e discretion of the court in imposing the increased sentences for
ose offenses for which an increased penalty is authorized by the
et. See *Ross* v. *United States*, 37 F. (2d) 557; certiorari
enied, 281 U. S. 767. *McElvogue* v. *United States*, 40 F. (2d)
9; certiorari denied, 282 U. S. —, Oct. 13, 1930.

3. The sentence imposed on each of the petitioners exceeded the
aximum penalty for illegal possession under § 29 of the National
rohibition Act, which is, for a first offense, $500 fine, and for a
ird offense, "not less than $500" fine and not more than two
ars' imprisonment. As illegal possession is not one of the
enses enumerated in the Jones Act for which increased penalties
provided, and as the sentences imposed exceed any authorized
§ 29 of the National Prohibition Act, the court below was in
or in holding that they were supported by convictions on the
ond count, that for possession.

Since the convictions were upheld under the first count, sen-
ces under the Jones Act were authorized, transportation being
of the offenses enumerated in that Act. But the possession al-
ed in the second count was not in itself necessarily an aggrava-
of the transportation charge which would warrant heavy sen-
es under the Jones Act as to either petitioner, and could not
as to Laurel, who, so far as the evidence shows, was a first
nder both as to the transportation and possession. While the
trict Court may have had before it facts other than those ap-
ring of record which it was entitled to consider in imposing
tence under the Jones Act, we think, in view of the confusion
ch has arisen with respect to the propriety of the sentences
er the possession count, that the District Court should be af-
ded an opportunity in its discretion to resentence the petitioners
he view of the applicable statutes, as stated.

he judgment will be reversed and the cause remanded to the Dis-
t Court for further proceedings in conformity with this opinion.

Reversed.